

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE**

**UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 4, affiliated with UNITED FOOD
AND COMMERCIAL WORKERS UNION**

and

Case 19-CB-9660

PAMELA BARRETT, An Individual

Richard Fiol, Seattle, Washington,
for the General Counsel.
Caren Sencer and David Rosenfeld,
Alameda, Calif., for Respondent

**BENCH DECISION, CERTIFICATION
and
ORDER**

JAMES M. KENNEDY, Administrative Law Judge: This case was tried in Whitefish, Montana on April 29, 2008. It was orally argued that day and the attached Bench Decision was rendered immediately thereafter. The charge was filed on September 29, 2007 and amended on November 23, 2007 by Pamela Barrett, an individual. The complaint issued January 31, 2007. Some technical amendments to both the complaint and the answer were made at the hearing. The complaint alleges that Respondent has violated §8(b)(1)(A) of the Act. Respondent's answer denies the commission of any unfair labor practice.

After hearing the evidence on April 29, I determined that it was appropriate for me to issue a bench decision under Board rule §102.35(a)(10). Pursuant to Board rule §102.45(a), I hereby attach pages 130-140 of the transcript to this decision and CERTIFY that it (with corrections as shown), is an accurate transcription of my decision as delivered.

Based on my findings of fact, including discrediting the Charging Party's testimony that she never received Respondent's letter of May 4, 2007, G.C.Exh. 3, and my conclusion of law that Respondent did not breach its duty of fair representation, I recommend the Board issue the following ¹

ORDER

The complaint is dismissed.

James M. Kennedy
Administrative Law Judge

Dated, Washington, D.C., May 20, 2008.

¹ If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1 (Off the record.)

2 JUDGE KENNEDY: On the record.

3 **BENCH DECISION**

4 JUDGE KENNEDY: Back on the record. The General Counsel
5 and the Respondent, having made oral arguments covering both
6 the factual and the legal issues in this matter have been --
7 their arguments have been carefully considered and I am
8 [facially] impressed with the General Counsel's Case, but on
9 further analysis I've come to the conclusion that the General
10 Counsel has not made the Case and I'm going to make some
11 findings now describing why that is so.

12 Some of these findings are going to be pro forma and deal
13 with the normal things that have to be seen in a conclusionary
14 fashion. So, I'll try to do this by paragraph number and if
15 Dave will keep me in line here with my numbering system, I'll
16 try to do that. Okay.

17 1. The Unfair Labor Practice Charge was filed by Pamela
18 Barrett on September 29, 2007 and she amended that Charge on
19 November 23, 2007.

20 2. Safeway, Incorporated is a Delaware Corporation
21 operating in Montana as a grocery chain.

22 3. Safeway is an Employer within the meaning of Section
23 2(2)2(6) and 2(7) and it's in commerce based upon the pleadings.

24 4. The union is a labor organization within the meaning
25 of paragraph -- Section 2, paragraph 5 of the Act and I

1 apologize for the pronunciation here but I find that Nicholai
2 B. Cocergine...

3 MR. COCERGINE: Cocergine, Your Honor.

4 JUDGE KENNEDY: Cocergine.

5 MR. COCERGINE: Yes, sir.

6 JUDGE KENNEDY: ...is the President of Respondent and [its]
7 Chief Executive Officer.

8 [6.]The union represents a Bargaining Unit of -- I would
9 guess it'd basically be retail store employees and I'm not
10 going to get into the specifics of it because they're set forth
11 in paragraph 5 of the Complaint but they're retail employees
12 employed by Safeway at its Whitefish, Montana grocery store and
13 those employees are all covered by a Collective Bargaining
14 Contract, which -- let's see. Did I lose my number here? I
15 think it's number 7 here anyway.

16 Number 6 was the Unit description here.

17 7. At pertinent times the Collective Bargaining Contract
18 had a union security clause requiring membership of the
19 employees in the union within 30 days or -- for meeting a
20 financial obligation if they didn't join the union[.] and that
21 the -- [pause]

22 8. That the union [expends] money that it receives as
23 dues and fees from its membership and from the employees it
24 represents, which are both for representational activities and
25 some of these are for non-representational activities.

1 9. On May 4th the union sent a letter to the newly-hired
2 Barrett ~~in~~ Respondent's Exhibit 3 and I should point out that I
3 believe that she was hired on April 7th and notified of her
4 right to join or to become a financial core membership -- a
5 financial core member and of her rights under the Beck
6 Doctrine. [The letter] also provided procedures to challenge
7 the allocations and the calculations that might have to be made
8 under the Beck doctrine.

9 10. I find that Barrett received that letter as it was
10 sent in the due course -- in due course to her in the same
11 manner that it was sent to other new hires in other Bargaining
12 Units represented by the union.

13 11. About two weeks after she was hired she joined the
14 union and signed a dues check-off form. That was 11.

15 12. In a May 9th letter she objected to payment of the
16 fees and dues for non-representational purposes and requested
17 full disclosure of verified financial expenditures.

18 13. By letter of May 11 the union acknowledged her
19 resignation and said she was considered to be a dues objector.

20 We'll be off the record for just a moment here.

21 **(Off the record.)**

22 JUDGE KENNEDY: On the record.

23 The May 11 letter enclosed two documents, one of which
24 was a -- is in evidence as General Counsel's Exhibit 5, which
25 is a description of the -- [a] statement of expenses and

1 allocations of expenses between chargeable and non-chargeable
2 expenses for Local 4, for Respondent and that's a one-paged
3 document.

4 It also included a multiple-paged document from the
5 International Union, the parent International Union, which
6 covered most of the same materials and had another breakout, a
7 breakout quite similar to that seen in General Counsel's
8 Exhibit 5. In the letter the dues membership Clerk, Jamie
9 DeLaurentis, stated "We have included a statement of expenses
10 and allocation of expenses between chargeable expenses and non-
11 chargeable expenses of the UFCW, Local 4 for the year ending
12 December 31, 2006.

13 Also enclosed is a statement of expenses from the United
14 Food and Commercial Workers International Union for year ending
15 December 31, 2005, which we received on March 19, 2007." Ms.
16 DeLaurentis explained that the International's figures --
17 breakdowns like this come on an unpredictable -- come in an
18 unpredictable manner, so these were the latest -- this was the
19 latest that they had -- that the union had from the
20 International.

21 And she described the columns A and B in those documents.
22 The column A is the total expenses for the respective union.
23 Column B is expenses chargeable to representational activities
24 and column C is the non-chargeable expenses, which are not
25 chargeable to representational activities. It is, of course,

1 the column C material, which would be deducted in some fashion
2 from the overall representational expenses.

3 She also stated in the letter that in her opinion or in
4 the union's opinion the statement of expenses refer[red] to
5 fair -- "represents fairly, in all material respects the total
6 expenses of UFCW, Local 4 and the allocation of expenses
7 between chargeable expenses and non-chargeable expenses for the
8 year ending December 31, 2006. These figures are from our
9 final third party reviewed end -- reviewed year-end financials
10 and you have a right to challenge the allocation of
11 representational and non-representational expenses." ~~end quote.~~

12 14. On May 16 the union sent Ms. Barrett a letter
13 advising ~~that~~ -- her that as a dues objector it had calculated
14 her fee as -- her monthly fee as being \$31.50 per month.

15 Did I say that was number 14?

16 COURT REPORTER: You're on 15 now.

17 JUDGE KENNEDY: I'm at 15 now. Okay.

18 15. On May 29 Barrett claimed, by a letter, that she had
19 not been provided with information sufficient for her to make -
20 - to understand the fee as it had been calculated. She asked
21 for her procedural rights in that letter. However, I find that
22 she had been provided with those procedural rights in [the] May
23 4th letter. She asked for financial disclosure for the -- and
24 for the calculations of the fee[s] yet these had been provided
25 also in the May 11 letter and ~~the~~ GC-5, which was included in

1 the letter. She also asked for a verification of the figures
2 by an independent Certified Public Accountant. Now I want to
3 comment on that. Such a request or a demand [in] the way it
4 was characterized, is not an accurate statement of what the
5 union must provide to a dues objector.

6 Then in that letter Ms. Barrett demanded that she be
7 relieved of all dues obligations because in her opinion the
8 information, which had been provided to her was insufficient.
9 In her -- [H]er statement in the letter was "If the union does
10 not possess such financial disclosure, or if it is not provided
11 to me, then you have no right to collect any fees from me as a
12 condition of employment."

13 16. The union responded by letter of June 15 that --
14 this again by Ms. DeLaurentis that -- essentially that the
15 union was small and had very few non-chargeable expenses and so
16 that was the explanation for the high rate that the -- of 95%,
17 a rate that had been set forth in the -- in GC-5 and it
18 reiterated that she was getting a discount of \$31.50 per month
19 instead of the \$33.00 per month charged full members.

20 She also noted in that letter that there had been a CPA
21 letter included in the International's submission.

22 17. On December 14th the union issued Barrett a refund in
23 the lower amount, which essentially is ~~in~~ a refund of \$29.80.
24 She refused to accept the check. I find that this refund was
25 entirely unnecessary. It seems to have been a -- based on a

1 cautionary belief that somehow there might have been something
2 wrong with its figures found in GC-5. I do not find that to be
3 the case and I believe that General Counsel's Exhibit 5 is a
4 fair representation and fairly provides Ms. Barrett with
5 information on which to take further steps if she chooses. In
6 any event, as I understand it the parties have stipulated, I
7 guess, that Barrett refused to accept the check

8 18. In the December 14th transmittal letter, let's see,
9 there was included an independent Public Accountant's review
10 report dated December 31, 2006. That was the most recent
11 review, which had been conducted [by] an outside agency. That
12 firm is the Newland and Company, apparently an accounting firm
13 in Butte, Montana.

14 I guess, Ms. Sencer, that the heading there under that
15 independent Accountant's report from Newland I read that to say
16 CPA's but it's kind of curved in the Xerox. It's hard for me
17 to [read] it but I guess you assert that they are indeed
18 Certified Public Accountants.

19 MS. SENCER: Yes.

20 JUDGE KENNEDY: Okay. That's all I really need.

21 Now I find, though, [what] the Newland Company did on
22 February 19, 2007 was not an audit in the generally used sense
23 as the accountancy industry would use it. Nevertheless, it
24 reflects this Accountant's -- accountancy firm's view that
25 there is no reason to modify the financial statements as they

1 had been written and therefore, I think this is a fair
2 statement of their assessment that things are okay with the
3 material set forth therein and it is from that, of course, that
4 General Counsel's Exhibit 5 was created. In this regard I
5 observe that all financial reviews and all audits rely on
6 material provided by the management of the enterprise being
7 audited and indeed the Newland letter so states. They
8 acknowledge that they are less in scope than -- in scope than
9 an audit and, of course, they say the objective[...] Well[...] And
10 they weren't suggesting they were performing an audit but they
11 were making the review that they did and they didn't have any
12 doubts about the accuracy of the material at that point.

13 So, therefore, I find that because General Counsel's
14 Exhibit 5 is based on the material set forth in the independent
15 Accountant's report that General Counsel's Exhibit 5 adequately
16 did break down the types of expenditures which were made and
17 shows the -- how -- shows the categories, which are chargeable
18 to representational activities and which are not. Now, the
19 only doubt that that would leave is whether or not the figures
20 themselves are accurate and that is, of course, beyond the
21 obligation of the Auditor. That is, in fact, the obligation of
22 the union itself and the figures there may be challenged under
23 the Beck Rules and that -- so far as I know Ms. Barrett has not
24 challenged these figures but she certainly has had sufficient
25 information that she could if she chose and procedures, of

1 course, have been provided to her. (I know she says she didn't
2 receive the letter of May 4th, which describe those matters but
3 as I said I find that she did receive it and I'm sure she can
4 get another copy of it [and] the union would provide it for her
5 if she requested it.)

6 So, therefore, in conclusion as a matter of law I find
7 that the union has not breached the duty of fair representation
8 regarding Barrett's -- regarding Barrett by assigning to her a
9 monthly due[s] figure of \$31.50. The union's treatment here of
10 Barrett was fair under the doctrine set forth in Beck,
11 California Saw and KGW Radio.

12 As a final comment on this, I know that Respondent made
13 an argument with respect to whether the NLRB's General Counsel
14 was seeking a different level of review [than] -- that required
15 by Department of Labor regulations -- when the unions file
16 their LM2 reports annually -- and I'd like to point out that I
17 think that given the fact that the LM2's are verified by the
18 union and that the documents themselves contain material that
19 is later and maybe is the same as the material that's set forth
20 in the objective breakdowns and that sort of thing, I think
21 that sufficient verification has indeed been made that those
22 numbers are accurate. Of course, they're in a different
23 format, so it may be a little bit confusing but I do not find
24 that there's anything wrong with what the union did here with
25 respect to using those numbers or referring anybody to those

1 numbers.

2 This is not to say that I disagree with the General
3 Counsel when he says that the union can't put the burden on an
4 employee to go chasing the DOL numbers. I think the DOL
5 numbers and the documents there are publicly available but I
6 don't think that an individual employee is obligated to go hunt
7 them down for him or herself. Still, I don't see that holding
8 the -- that the Labor Board, under its Act, has any greater
9 right to a higher standard of financial care than does the
10 Department of Labor.

11 So, if the union meets the standard that is set forth by
12 the Department of Labor of care with respect to the financials
13 it has, I think, adequately verified, if you will, what needs
14 to be verified and meets the duty of care to an employee when
15 it meets that same level of care. I can't see why there would
16 be any difference in that.

17 Now, I'm also going to comment, however, that, [this] is
18 not really a finding that I need to make here in terms of the
19 dismissal but I just would observe the argument -- that the
20 union's argument here is more persuasive than that of the
21 General Counsel. All right.

22 That concludes my Decision and I will, as I described off
23 the record, issue a -- when the transcript becomes available I
24 will rather quickly issue a certification of transcript and
25 Decision and at that time anybody who chooses is free to file

1 an Appeal with the Board under the normal review procedures. I
2 will -- I think we -- there's a due date that comes out with
3 the order -- showing what the due date for that will be. I
4 don't have to state it here. All right.

5 Does anybody think I need to be -- clarify anything in
6 any of my findings? Nobody saying [anything], I will declare
7 the Hearing closed. Off the record.

8 **(Whereupon, the Hearing in the above-entitled matter was**
9 **closed.)**

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